INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	3
Argument	8
Conclusion	20

CITATIONS

Cases:

Beasley v. *United States*, 491 F.2d 687	15
California v. *Green*, 399 U.S. 149	10
Glasser v. *United States*, 315 U.S. 60	15
Grunewald v. *United States*, 353 U.S. 391	9
Harris v. *New York*, 401 U.S. 222	12, 13
Lego v. *Twomey*, 404 U.S. 477	18
Lutwak v. *United States*, 344 U.S. 604	15
McMann v. *Richardson*, 397 U.S. 759	15
Oregon v. *Hass*, No. 73–1452, decided March 19, 1975	12
Palermo v. *United States*, 360 U.S. 343	19
Scales v. *United States*, 367 U.S. 203	19
United States v. *DeCoster*, 487 F. 2d 1197	14
United States v. *Fanning*, 477 F. 2d 45, certiorari denied, 414 U.S. 1006	19
United States v. *Fench*, 470 F. 2h 1234, certiorari denied *sub. nom. Blackwell* v. *United States*, 410 U.S. 909	13
United States v. *Gant*, 487 F. 2d 30, certiorari denied, 416 U.S. 941	13
United States v. *Geaney*, 417 F. 2d 1116, certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028	16

575-667—75——1

Cases—Continued Page

United States v. *Gonzalez*, 491 F. 2d 1202 13
United States v. *Grant*, 489 F. 2d 27 14
United States v. *Graves*, 428 F. 2d 196 certiorari denied, 400 U.S. 960 19
United States v. *Insana*, 423 F. 2d 1165, certiorari denied, 400 U.S. 841 10
United States v. *Miramon*, 470 F. 2d 1362, certiorari denied, 411 U.S. 934 14
United States v. *Perez*, 491 F. 2d 167, certiorari denied *sub nom. Lombera* v. *United States*, October 15, 1974 (No. 73–6784) 12–13
United States v. *Polizzi*, 500 F. 2d 856, certiorari denied, January 20, 1975 (No. 74–322) 16
United States v. *Robinson*, 502 F. 2d 894 14
United States v. *Santana*, 503 F. 2d 710, certiorari denied, December 9, 1974 (No. 74–5311) 15, 16
United States v. *Thornton*, 498 F. 2d 749 ..... 16, 17
United States ex rel. Walker v. *Henderson*, 492 F. 2d 1311, certiorari denied, 417 U.S. 972 .. 14
Walder v. *United States*, 347 U.S. 62 ..... 12, 13

Statutes and rule:

21 U.S.C. (1964 ed.) 173 3
21 U.S.C. (1964 ed.) 174 3
21 U.S.C. 812 3
21 U.S.C. 841(a)(1) 3
21 U.S.C. 841(b)(1)(A) 3
21 U.S.C. 951(a)(1) 3
21 U.S.C. 952 3
Rule 801(d)(1), Federal Rules of Evidence (effective date, July 1, 1975) 10

Miscellaneous:

III Wigmore, *Evidence*, § 841(2), pp. 489–493 (Chadbourn rev.) 18

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1085
THOMAS MATTEO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-1143
JOHN INDIVIGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-6161
FRANK BREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion.

JURISDICTION

The judgment of the court of appeals (No. 74–1085, Pet. App., pp. 36–37) was entered on February 11, 1975. The petitions for writs of certiorari in Nos. 74–1085 and 74–1143 were filed on February 28, 1975, and the petition in 74–6161 was filed on March 10, 1975.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner in No. 74–1085 presents the following questions:

1. Whether the grand jury testimony of a recalcitrant government witness was properly admitted for impeachment purposes.

2. Whether a testifying defendant's out-of-court admission, made while in custody in the absence of *Miranda* warnings, was properly used for impeachment purposes upon cross-examination.

3. Whether the government's rebuttal evidence against petitioner Matteo was properly admitted.

4. Whether petitioner Matteo was denied the effective assistance of counsel.

Petitioners in Nos. 74–1143 and 74–6161 present the following questions:

5. Whether there was sufficient evidence of participation in the conspiracy by petitioners Indiviglio and Breen.

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[1] The petition in No. 74–1143 was originally filed in typescript on February 28, 1975, and it was returned to counsel on that date. Printed copies were filed on March 10, 1975, and the case was then docketed as of the earlier date.

6. Whether the trial court abused its discretion in rereading the government's final argument to the jury.

Petitioner in No. 74–6161 additionally presents the following questions:

7. Whether an out-of-court admission, made by petitioner Breen while intoxicated, was admissible in evidence.

8. Whether certain grand jury testimony and other sealed reports should have been furnished to petitioner Breen.

STATEMENT

Following two separate jury trials in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiring to import and distribute heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174 (for transactions occurring prior to May 1, 1971), and 21 U.S.C. 812, 841(a)(1), 841(b)(1)(A), 951(a)(1), and 952 (for transactions occurring after May 1, 1971).[2] Petitioners received the following sentences: Matteo, ten years' imprisonment and a special parole term of five years; Indiviglio, twelve years' imprisonment and a special parole term of five years; Breen, seven and one-half years' imprisonment and a special parole term of five years.

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[2] Petitioners were charged in a single-count indictment with conspiring with unindicted co-conspirators Frank Aguiar and James McCormack. Petitioner Indiviglio's case was severed prior to the first trial. Petitioner Breen's case was severed during the first trial. Accordingly, petitioner Matteo was tried alone and convicted on June 14, 1974. Subsequently, petitioners Indiviglio and Breen were tried together and convicted on August 16, 1974.

Briefly summarized, the overlapping evidence adduced at the two trials revealed the existence of a conspiracy pursuant to which large quantities of heroin were imported from France and distributed to buyers in the United States. Although membership in the conspiracy changed from time to time, the core membership and the purpose of the conspiracy remained intact. Petitioner Indiviglio's role in the conspiracy was that of the main importer of heroin from French sources; petitioners Matteo and Breen functioned as major distributors of heroin within the United States.

A. THE TRIAL OF PETITIONER MATTEO

In the summer of 1968, Frank Aguiar, the government's principal witness, was in the business of selling heroin. His source of supply was Tyler Somas. Unhappy with the quality of heroin that he was receiving, Aguiar met with Somas and petitioner Matteo. At that time, Matteo promised Aguiar that he would receive better heroin in the future. Thereafter, Aguiar continued to receive small amounts of heroin from Somas (Tr. I, 134–137).[3]

In the fall of 1969, Aguiar again met with petitioner Matteo, who was accompanied by petitioner Breen. Matteo asked Aguiar how much money he had made from his narcotics dealings since their first meeting. Aguiar stated that he had made approximately $67,000.

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[3] "Tr. I" refers to the transcript of petitioner Matteo's trial; "Tr. II" refers to the transcript of the trial of petitioners Indiviglio and Breen.

Matteo was puzzled at this response because he had received only $2,000 from Somas. Matteo said that he would get to the bottom of the matter of payments and also indicated that thereafter Aguiar would be dealing directly with him and Breen (Tr. I, 141–143). In November 1969, petitioners Matteo and Breen went to Aguiar's apartment and asked to borrow $16,000 in order to finance a heroin business dealing in larger quantities. They offered Aguiar a partnership in exchange for a loan. Aguiar stated, however, that he would lend the money only if they agreed to furnish him with uncut heroin at cost (Tr. I, 147–150, 353–354). A few days later, Aguiar gave $16,000 to Matteo and Breen (Tr. I, 150).

Several days later, Matteo and Breen brought a kilogram of heroin to Aguiar's apartment, where it was divided into eight packages. Thereafter, Matteo and Breen took the heroin and left (Tr. I, 150–151, 355–356). A few days later, Breen returned to Aguiar's apartment and asked Aguiar to store the packages of heroin. Subsequently, either Matteo or Breen picked up the heroin (Tr. I, 152–154).

Throughout 1970, Aguiar purchased progressively larger quantities of heroin from Matteo; in the latter part of the year, he was purchasing three kilograms at a time (Tr. I, 158–159). Between November 1970 and January 1971, Aguiar and Matteo conducted their heroin dealings as partners; they earned $170,000 in profits during those months. Following dissolution of that partnership, Matteo continued to supply heroin to Aguiar (Tr. I, 161–163).

Aguiar made increasingly larger purchases, culminating in a series of ten-kilogram transactions (Tr. I, 163–164). In September 1972, Aguiar arranged to buy another ten kilograms of heroin through Matteo, for a total price of $270,000. Matteo was to make the purchase by using $190,000 of his own money (representing a debt that he owned Aguiar) and additional monies to be supplied by Aguiar. Aguiar was to deliver $60,000 in cash to Matteo in advance and an additional $20,000 when the narcotics were received. Aguiar delivered the $60,000 (Tr. I, 172–174); however, the following day, Matteo was found shot (not fatally) in the home of petitioner Indivigilo (Tr. I, 520–521). The police also found an attache case near Matteo's body, containing $350,000 in cash (Tr. I, 524).

B. THE TRIAL OF PETITIONERS INDIVIGLIO AND BREEN

In the spring of 1968, Matteo approached Somas to arrange a business deal whereby Somas would manage Matteo's heroin business (Tr. II, 26). At that time, Matteo was living in an apartment building owned by petitioner Indiviglio, the basement of which contained a laboratory (Tr. II, 27–28). On one occasion, Matteo and Somas picked up some dark brown heroin samples that had been left in the laboratory and delivered them to James McCormack, who tested the samples (Tr. II, 29, 31, 35–36). McCormack told Aguiar that he was dealing in heroin supplied by Indiviglio (Tr. II, 236), and he explained that the heroin was brown because it had been damaged in shipment and then treated by Indiviglio (Tr. II, 238).

Matteo instructed Somas to provide petitioner Indiviglio with any funds he might need in order to travel to France to arrange a source of heroin (Tr. II, 37–38, 40). Thereafter, Matteo, Somas, and Indiviglio held a meeting during which Indiviglio said that he was planning a trip to Europe (Tr. II, 41–42). Several months later, Indiviglio asked Somas for $5,000 for a trip; however, Somas was only able to give him $3,000 (Tr. II, 43–44). Upon his return, Indiviglio said that someone in Newburgh, New York, had "taken his connection away". Indiviglio stated that a letter relating to a shipment was being sent to the person in Newburgh and asked Somas to go to Newburgh and steal the letter (Tr. II, 44–45).

In early 1969, Somas began purchasing small amounts of heroin from petitioner Breen (Tr. II, 49–50). Somas was in turn supplying heroin to Aguiar. After Aguiar complained to petitioner Matteo about the quality of heroin that he was receiving from Somas, Breen undertook to supply Aguiar directly and did so on two occasions (Tr. II, 241–244).

In the fall of 1969, Aguiar agreed to lend Matteo and Breen $16,000 to be used in their heroin dealings, provided that he be given an option to purchase uncut heroin at cost (Tr. II, 247–248). Soon thereafter, Matteo and Breen brought a kilogram of heroin to Aguiar's apartment to be divided into ⅛-kilogram packages (Tr. II, 88, 249–250). A few days later Breen returned to the apartment and asked Aguiar to store three packages of heroin, which Breen and Matteo subsequently picked up (Tr. II, 250–251, 254).

575-667—75——2

In 1970, Breen told Aguiar that he and Matteo were no longer in partnership (Tr. II, 255). Nonetheless, Breen continued to supply heroin to Somas on at least seven occasions, the last of which involved delivery of one pound of heroin (Tr. II, 167–168, 173–175).

During this time, petitioner Indiviglio told Somas's wife that he had made "millions" in the narcotics business by importing foreign cars containing caches of heroin (Tr. II, 180–181. 183–184, 219–220).

In September 1972, Matteo was found in Indiviglio's home. He had been shot five times in the back but was still alive. Next to Matteo was an attache case containing $350,050 in cash (Tr. II, 364, 369). Police officers also found laboratory equipment used in the processing of heroin (Tr. II, 382–384).

ARGUMENT

1. James McCormack, an unindicted co-conspirator, was called as a government witness. After testifying that he knew petitioner Matteo and had met with him in 1967 or 1968 (Tr. I, 460–463), McCormack claimed that he was unable to remember any events that would incriminate Matteo.[4] Thereafter, the government was permitted to use McCormack's detailed grand jury testimony in an attempt to refresh his memory and, in the alternative, for the purpose of impeachment (Tr.

[4] Before he testified, McCormack was examined by the court. McCormack claimed at that time that he could not recall his dealings with Matteo. The court then held McCormack in contempt (Tr. I, 440), ruling that he was willfully refusing to answer questions (Tr. I, 437–438, 444).

I, 468–497).[5] For the most part, McCormack testified that he could not recall whether or not he had given the testimony set forth in the grand jury record.

Petitioner Matteo incorrectly contends (Pet. 15–24) that the trial court erred in allowing the government to use McCormack's grand jury testimony for impeachment purposes. A court may properly admit a witness's prior statement as impeachment evidence if it is inconsistent with his testimony at trial. *Grunewald* v. *United States*, 353 U.S. 391, 418. In this case, it was clear that McCormack was merely feigning a faulty memory in order to protect Matteo. As the trial judge observed (Tr. I, 514):

> Not once did [McCormack] complain of being sick while he was under cross examination. On cross examination he answered every question asked by [petitioner's trial counsel]. He remembered matters that occurred at a time earlier to [*sic*] the time he appeared before the Grand Jury.
>
> He was quite articulate in describing the programs that he received in State custody.
>
> It is clear to me that this witness never intended to testify directly or give testimony that was required of him; that he answered

[5] Petitioner Matteo mistakenly intimates that the grand jury testimony was introduced as substantive evidence. Following the objection of petitioner's trial counsel (Tr. I, 539–540), the court stated: "[T]o the extent that [McCormak] refused to admit any of the statements, I would say that it is not admissible under the substantive crime" (Tr. I, 541). Thereafter, the court's jury instruction on prior inconsistent statements limited their consideration to "judging the credibility of the witness" (Tr. I, 742–743).

> questions that inculpated himself, but refused to answer questions that inculpated [petitioner] Matteo.

Accordingly, the court was well within its discretion in allowing the use of McCormack's prior inconsistent grand jury testimony for impeachment purposes.

As the Second Circuit held in the similar case of *United States* v. *Insana*, 423 F. 2d 1165, 1170 (C.A. 2), certiorari denied, 400 U.S. 841:[6]

> Where * * * a recalcitrant witness who has testified to one or more relevant facts indicates by his conduct that the reason for his failure to continue to so testify is not a lack of memory but a desire "not to hurt anyone," then the court has discretionary latitude in the search for truth, to admit a prior sworn statement * * * [T]he trial judge's hands should [not] be tied where a witness does not deny making the statements nor the truth thereof but merely falsifies a lack of memory.[7]

---

[6] In *Insana*, the witness responded "If he says I said it, I guess I did"; and "I don't remember"; and "If he has it on the record I guess I must have"; and finally, "I don't recall" (423 F. 2d at 1168). In the instant trial, McCormack's responses included, "I recall the conversation, but not that question and not that answer" (Tr. I, 470); "That sounds familiar. I am not positive" (Tr. I, 471); "It may be down there, but I don't remember those questions at all" (Tr. I, 476); "At the moment I can't think at all" (Tr. I, 484); and "I am not sure at this time" (Tr. I, 487).

[7] The court in *Insana* held that such statements were admissible as substantive evidence. See also *California* v. *Green*, 399 U.S. 149; Rule 801(d)(1) of the Federal Rules of Evidence (effective date, July 1, 1975). *A fortiori*, the district court here had discretion to admit McCormack's prior statements for impeachment purposes.

2. Following his arrest, petitioner Matteo made inculpatory statements to a government agent. At a pretrial hearing, these statements were suppressed on the ground that they had been made in the absence of *Miranda* warnings. The statements were, however, used for impeachment during the course of the cross-examination of Matteo. Petitioner Matteo claims (Pet. 24–27) that that use was improper.

At trial, Matteo testified in his own behalf. He admitted that he was involved in illegal gambling operations but denied that he had been trafficking in narcotics (Tr. I, 575–578). On cross-examination, Matteo again denied involvement in the drug trade, stating that he had never purchased or sold heroin at any time (Tr. I, 593). Although Matteo admitted knowing of petitioner Indiviglio's involvement in the narcotics trade, he said that this knowledge came from a single conversation in which Indiviglio had acknowledged that he was once involved with narcotics (Tr. I, 605–606). Thereafter, the trial court allowed Matteo to be cross-examined concerning the inculpatory statements that he made while in custody (Tr. I, 612–613):

> Q. In that conversation, do you recall that Agent Schnepper said to you that he was aware that you had done [five] to [ten] kilograms of heroin at a time but wanted to know what Indivigli[o] was doing, and that you responded that Indivigli[o] was doing 30 to 40 kilograms at a time. Do you recall that conversation?
>
> A. Yes.
>
> Q. Is that what you said?
>
> A. Yes, that's right.

> **Q. Did you also state that Indvigli[o] had lost his European connection a while ago, because the connection had gotten jammed up with the police in France?**
>
> A. Right.

Petitioner voluntarily elected to take the stand in his own defense and was, therefore, properly subjected to "the traditional truth-testing devices of the adversary process." *Harris* v. *New York*, 401 U.S. 222, 225. The impeachment use of his prior admission was proper. *Oregon* v. *Hass*, No. 73–1452, decided March 19, 1975; *Harris* v. *New York*, *supra*. See also *Walder* v. *United States*, 347 U.S. 62.

3. During his testimony, petitioner Matteo generally denied trafficking in narcotics (Tr. I, 576–578, 593) and specifically denied meeting anyone at the Club International for the purpose of arranging a purchase of narcotics (Tr. I, 613). In rebuttal, the government offered testimony that showed that Matteo had traded in drugs (Tr. I, 630), that a meeting between a narcotics dealer and Matteo had been arranged at the latter's request (Tr. I, 630–631), that Matteo was introduced to the narcotics dealer at the Club International (Tr. I, 631), and that Matteo effected a large purchase of narcotics several days later (Tr. I, 631–632).

Petitioner Matteo claims (Pet. 28–31) that this rebuttal testimony was improperly received. But as petitioner concedes (Pet. 29), the admissibility of rebuttal evidence is within the broad discretion of the trial court, and its determination will not be reversed unless that discretion has been abused. See, *e.g.*,

United States v. *Perez*, 491 F. 2d 167, 173 (C.A. 9), October 15, 1974 (No. 73–6784); *United States* v. *Fench*, 470 F. 2d 1234 (C.A.D.C.), certiorari denied *sub nom. Blackwell* v. *United States*, 410 U.S. 909. That discretion was not abused here. Matteo had flatly denied ever dealing in narcotics; in the circumstances of this case it was well within the court's discretion to allow the government to impeach Matteo's credibility by introducing evidence that contradicted his testimony. *Harris* v. *New York, supra; Walder* v. *United States, supra.* See, also, *United States* v. *Gonzalez*, 491 F. 2d 1202, 1204 (C.A. 5); *United States* v. *Gant*, 487 F. 2d 30, 33 (C.A. 10), certiorari denied, 416 US 941; *United States* v. *Fench, supra.*

4. Petitioner Matteo further argues (Pet. 31–34) that he was denied the effective assistance of counsel because his trial attorney failed to object to the admission of certain evidence that Matteo characterizes as irrelevant and prejudicial. Specifically, he points to the use for impeachment purposes of McCormack's grand jury testimony and his own admissions to Agent Schnepper and to the introduction of evidence about his near-fatal shooting. But as we have shown above, the impeaching evidence was properly admitted. And the evidence of the circumstances surrounding Matteo's shooting was relevant and admissible. The discovery of narcotics paraphernalia and a large amount of cash in co-conspirator Indiviglio's home, at the time of Matteo's shooting in that home, tended to corroborate Aguiar's testimony that, on the day before the shooting, he had given Matteo $60,000 for the

purchase of a large quantity of heroin. Any objection to the introduction of that evidence presumably would have been unavailing.

The tactical and strategic decisions made by an attorney during the course of a trial are not ordinarily subject to scrutiny on review. See, *e.g., United States ex rel. Walker* v. *Henderson,* 492 F. 2d 1311 (C.A. 2), certiorari denied, 417 U.S. 972; *United States* v. *Grant,* 489 F. 2d 27 (C.A. 8). However, under any applicable standard of appellate review, the record supports the conclusion that petitioner Matteo was, in fact, afforded adequate assistance of counsel. Compare *United States* v. *Robinson,* 502 F. 2d 894, 896 (C.A. 7), *United States ex rel. Walker,* v. *Henderson, supra,* and *United States* v. *Miramon,* 470 F. 2d 1362 (C.A. 9), certiorari denied, 411 U.S. 934 (ineffective representation consists of conduct that shocks the conscience of the court and makes the proceedings a farce and mockery of justice) with *United States* v. *DeCoster,* 487 F. 2d 1197, 1202 (C.A.D.C.) (defendant entitled to "the reasonably competent assistance of an attorney acting as his diligent conscientious advocate").

Matteo's trial attorney conducted an extensive cross-examination of the government's witnesses, presented a plausible theory of defense in his opening statement, explored that defense through Matteo's own testimony, and summarized the evidence and his theory during final arguments. The record fails to disclose (and petitioner Matteo does not allege) any potentially exonerating defenses that were not considered by defense counsel or any exculpatory evidence that was not

introduced. Throughout the trial, defense counsel rendered the reasonably effective assistance demanded of an attorney of ordinary skill and training in criminal law. See *McMann* v. *Richardson*, 397 U.S. 759, 770–771; *Beasley* v. *United States*, 491 F. 2d 687, 696 (C.A. 6).

5. Petitioner Indiviglio contends (Pet. 4–5, 7–8) that there was insufficient non-hearsay evidence to establish his participation in the conspiracy.[8] We disagree. The direct evidence showed that petitioner Matteo lived in an apartment building owned by Indiviglio and that he picked up samples of heroin from a laboratory located in that building; that Matteo and Somas had paid for Indiviglio's trip to France out of their narcotics earnings; that following Indiviglio's trip to France he reported to Somas that someone in Newburgh, New York, had taken away his connection, and Somas was sent to steal a letter relating to this lost connection; and that a large quantity of laboratory equipment suitable for processing heroin was found in Indiviglio's home. Moreover, Fay Somas testified to a conversation with Indiviglio during which the latter stated that he had made "millions" by importing heroin secreted in foreign cars.[9] Accord-

[8] Petitioner Breen also incorporates this contention in his petition, but there was ample direct evidence of Breen's involvement in narcotics transactions to warrant the admission against him of the declarations of co-conspirators. See *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Santana*, 503 F. 2d 710 (C.A. 2), certiorari denied, December 9, 1974 (No. 74–5311).

[9] That testimony was of course admissible against the declarant, Indiviglio, as an admission without regard to the admissibility of the declarations of his co-conspirators. Cf. *Lutwak* v. *United States*, 344 U.S. 604, 618.

ingly, McCormack's declaration to Aguiar that Indiviglio supplied heroin to him was properly considered by the jury. *United States* v. *Santana, supra; United States* v. *Geaney,* 417 F. 2d 1116, 1121 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States,* 397 U.S. 1028.

6. Petitioners Indiviglio and Breen contend (No. 74–1143, Pet. 5–7; No. 74–6161, Pet. 15) that the trial court erred in allowing a portion of the government's summation to be read to the jury. It is well recognized, however, that the trial court has wide discretion in evaluating the consequences of reading portions of the transcript to the jury.[10] See, *e.g., United States* v. *Thornton,* 498 F. 2d 749, 753 (C.A.D.C.). Although petitioners allege that prejudice resulted, neither they nor the record substantiates that claim.

During its deliberations, the jury requested that the government's summation be read to them. Prior to the reading of the requested transcript the court admonished (Tr. II, 865):

> Now, again understand that summation is not testimony. It's just the argument of counsel and don't lose sight of the other summations by the other lawyers * * *.

Thereafter, the court reporter read back a portion of the government's summation. After the jury was satisfied that they had heard enough of the summation, the court again instructed (Tr. II, 868):

[10] The court's discretion is not limited to the reading of evidentiary portions of the transcript. See, *e.g., United States* v. *Polizzi,* 500 F. 2d 856, 876 (C.A. 9), certiorari denied, January 20, 1975 (No. 74–322).

> The portion of the summation was a discussion by Mr. Weintraub of the evidence. Of course, that isn't evidence, it's only what he says, what he finds from the evidence.

It is apparent that the jury's verdicts resulted from a careful evaluation of the evidence. At the same time that the jury requested the reading of the summation, it also asked to see Exhibit 47 (a shipping notice) (Tr. II, 359, 857). Thereafter, the jury asked to examine Exhibit 52, consisting of several documents found in petitioner Indiviglio's home (Tr. II, 446, 867) and all of the letters from "Bob" that were found in Indiviglio's home (Tr. II, 867). The jury then requested Exhibit 46, a photograph of the money found near Matteo's body following his shooting (Tr. II, 359, 869). Finally, it requested and heard Aguiar's testimony on direct examination, on cross-examination by Indiviglio's counsel, on redirect examination, and on recross-examination by Indiviglio's counsel (Tr. II, 870–872). Certainly in these circumstances the reading of a portion of the government's summation, which the jury used, at most, as a guide to the evidence, did not cause substantial prejudice or constitute reversible error. Cf. *United States* v. *Thornton, supra.*

7. Petitioner Breen contends (Pet. 9–14) that certain admissions to his friend, James Schmidt, were improperly admitted at trial because he had been intoxicated at the time he made them.[11] The criterion for the

[11] Schmidt was a police officer, but petitioner Breen concedes (Pet. 10) that his statements were not the result of a custodial interrogation.

admissibility of confessons or admissions made while in a state of self-induced intoxication is simply that of trustworthiness. See III Wigmore, *Evidence,* § 841 (2), pp. 489–493 (Chadbourn rev.). There was ample evidence here that Breen was not so intoxicated that his admissions were inherently untrustworthy.

Breen had placed a telephone call to a Long Island bar where Schmidt's in-laws worked. Breen explained that he was in a downtown Manhattan bar and needed a ride to Long Island because the train was not running at that hour of the night (Tr. II, 424, 429–430, 460, 542). Breen gave Schmidt detailed directions on how to reach the Manhattan bar; thereafter, Schmidt drove to meet Breen (Tr. II, 430–431). Upon reaching the bar, Schmidt played a game of pool with Breen (Tr. II, 427) and also engaged in a discussion over drinks. It was during this time that Breen made the inculpatory statements. Subsequently, Schmidt drove Breen back to Long Island. Schmidt characterized Breen's conversations that night as both coherent and responsive (Tr. II, 462–463). Schmidt's characterization was corroborated in part by Breen, who was able to reconstruct the events of the night in question (Tr. II, 529–532, 540–543), admitted that he remembered the happenings of that night "fairly well" (Tr. II, 542), and conceded that he could hold his liquor "fairly well" (Tr. II, 541). Accordingly, there, was ample basis for the trial court's conclusion that Breen's statements were sufficiently trustworthy to be admissible. Cf. *Lego* v. *Twomey,* 404 U.S. 477.

8. Finally, petitioner Breen urges (Pet. 14–15) that this Court further review certain sealed grand jury transcripts and investigative reports to determine whether all material relating to the testimony of the government's witnesses was produced. However, a criminal defendant is not entitled to the production of statements of witnesses "which do not relate to the subject matter of their testimony" (*Scales* v. *United States,* 367 U.S. 203, 258) or to investigative reports that are "the product of the investigator's selections, interpretations, and interpolations" (*Palermo* v. *United States,* 360 U.S. 343, 350) and were not the subject of testimony at trial.

The trial court conducted an *in camera* inspection of the material here in question, and it was then sealed and forwarded to the court of appeals for an "appropriately limited review." *Palermo* v. *United States, supra,* 360 U.S. at 353. Petitioner Breen neither demonstrates a "particularized need" for the material nor does he show that the determinations of the courts below were clearly erroneous. Further review by this Court is unwarranted. See *United States* v. *Fanning,* 477 F. 2d 45, 49 (C.A. 5), certiorari denied, 414 U.S. 1006; *United States* v. *Graves,* 428 F. 2d 196, 200 (C.A. 5), certiorari denied, 400 U.S. 960.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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